Supreme Court, U.S.
FILED
NOV 15 1989
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No. 88-1897

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R.T. DAVIS, Director of the Michigan Dept. of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW AND JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, FLORIDA, NORTH CAROLINA AND THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

Does the use of sobriety checkpoints by the State of Michigan violate the Fourth Amendment because the brevity of their use as a deterrent technique may have limited empirical proof of their effectiveness?

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INTEREST OF AMICI CURIAE

Each year tens of thousands of people die on our nation's roads. About one-half of them have been killed by drunk drivers. It is difficult to identify and apprehend

an intoxicated driver before he injures or kills. Reliable estimates show that only one of 2000 drunk drivers is actually apprehended, often as a result of an accident or injury which he has caused. Because of the growth of this menace and the ineffectiveness of conventional law enforcement techniques in combatting it, over one-half of the States, California among them, have addressed the problem by using sobriety checkpoints. Typically, policy-making officials of a law enforcement agency devise a comprehensive plan identifying the dates and locations for a checkpoint. The plan also provides for procedures to implement the program, including: the number of officers, including supervisory personnel; the percentage of vehicles to be stopped; the length of the detention; the questions to be asked of the motorist; the lighting and safety features of the checkpoint; and the extent of the advance

publicity which identifies the location of the checkpoints. The purposes of these programs are to apprehend, deter, and educate. The California Supreme Court has upheld the constitutionality of sobriety checkpoints in the nation's largest state in terms of population and motor vehicles. *Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 (1987). Empirical evidence in California indicates that a checkpoint, carefully designed and implemented to minimize the intrusion into the privacy of the motorists, effectively deters drunk driving. Our interest in using this life-saving procedure brings the People of the States of California, Florida, North Carolina and the Commonwealth of Massachusetts before this Court as Amici Curiae.

SUMMARY OF ARGUMENT

Ordinarily a search or seizure is invalid unless supported by a warrant issued upon probable cause. Those requirements yield when special needs, beyond the need for law enforcement, make the warrant and probable cause requirement impracticable. When the State demonstrates a valid noncriminal purpose, the validity of the search is determined by balancing the need to search against the privacy invasion which the search entails. The warrant requirement is inapplicable if the affected activity is heavily regulated and the requirement of a warrant thwarts the purpose of the search. Individualized suspicion is not required if it, too, defeats the reason for the search.

The State of Michigan has a compelling noncriminal need to use sobriety checkpoints: the safety of its

motorists. The intrusion is almost trivial: a 30-second detention which involves no search of the car or its occupants. The checkpoint program is implemented with predetermined criteria that upper-echelon law enforcement personnel have drafted. Consequently, the discretion vested in the in-field officers is minimal, a factor which correspondingly reduces any intrusion.

A warrant is unnecessary to justify the checkpoint program because driving is so heavily regulated an activity that motorists enjoy a reduced expectation of privacy. A warrant requirement does not serve the traditional purposes advanced for its applicability because the statutory or regulatory authorization for checkpoints both advises the motorists of the reason for the stop and limits the field officers' discretion in conducting the detention.

Requiring either probable cause or individualized suspicion frustrates the purpose of the checkpoint program. Application of these requirements results in the detection of only one drunk driver for every 2000 who are on the road. The safety of motorists requires more effective deterrence and, consequently, the dispensation with individualized suspicion at the checkpoints.

Finally, California's experience with sobriety checkpoints in the past five years furnishes unmistakable evidence of their effectiveness. If this Court accepts that evidence, it must then determine whether a human life is worth 30 seconds of a motorist's time. We earnestly submit that the answer is "yes" and the sobriety checkpoints deserves this Court's constitutional imprimatur.

ARGUMENT

THE USE OF SOBRIETY CHECKPOINTS TO PROMOTE HIGHWAY SAFETY IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

The State of Michigan contends that its use of sobriety checkpoints to deter and identify drunk drivers is reasonable under the Fourth Amendment. *Amici curiae* emphatically support that position. We argue that the safety of highway motorists, thousands of whom are slaughtered each year by drunk drivers, justifies the minimal intrusion of a less than 30-second delay at a checkpoint. We further contend that it is reasonable to believe that the program is effective, but that its constitutionality does not depend upon proof that it is the most effective way to combat the menace of the drunk driver. Finally, we argue that it is not constitutionally necessary to obtain a warrant to implement

a sobriety checkpoint. For these reasons, we submit that that the Michigan sobriety checkpoint program does not offend the Fourth Amendment.

-A-

We begin by acknowledging that the detention of a motorist by law enforcement personnel at a checkpoint, even for a few seconds, is a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *cf. Michigan v. Chesternut*, ___ U.S. ___, 108 S.Ct. 1975, 1979 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984). The issue here is whether that seizure is reasonable within the meaning of the Fourth Amendment.

This Court's decisions teach that a search (or, as here, a seizure) must be supported by a warrant issued upon

probable cause. *See, e.g., National Treasury Employees Union v. Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, 1390 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *United States v. Karo*, 468 U.S. 706, 717 (1984). But the requirements of probable cause and the issuance of a warrant may both yield when "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Skinner v. Railway Labor Executives Ass'n*, ___ U.S. ___, 109 S.Ct. 1402, 1414 (1989), quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackman, J., concurring); *accord, Griffin v. Wisconsin, supra*, 483 U.S. at p. 873. When confronted with such "special needs," this Court has dispensed with both probable cause and the warrant requirement. *See, e.g., Skinner v. Railway Labor Executives Ass'n, supra*; *National Treasury Employees Union v. Von Raab, supra*;

Griffin v. Wisconsin, supra; *New York v. Burger,* 482 U.S. 691 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O., supra*; *Bell v. Wolfish*, 441 U.S. 520 (1979). This Court then determines the reasonableness of the search or seizure by balancing the legitimate governmental interests that the search or seizure promotes against the nature and extent of the intrusion into personal privacy that the search or seizure entails. *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1414; *New Jersey v. T.L.O., supra*, 469 U.S. at p. 337; *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse, supra*, 440 U.S. at p. 654; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce, supra*, 422 U.S. at p. 878; *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967).

This balancing process requires an assessment of the extent to which the challenged governmental conduct advances that stated public interest (*Brown v. Texas*, 443 U.S. 47, 50-51 [1979]; *United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 562; *United States v. Brignoni-Ponce, supra*, 422 U.S. at pp. 878-883), and the degree to which a person's reasonable expectation of privacy is subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *See Delaware v. Prouse, supra*, 440 U.S. at pp. 654-655; *United States v. Brignoni-Ponce, supra*, 422 U.S. at p. 882. The less discretion exercised by the officer, the less government intrudes into the rights of the citizens. "To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure

must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas, supra*, 443 U.S. at p. 51 (emphasis added); *cf. Colorado v. Bertine*, 479 U.S. 367 (1987).

-B-

This Court's decisions place the burden upon the government to establish the existence of special needs which outweigh the search warrant and probable cause requirements. The need to enforce a penal statute generally is not considered sufficient to justify dispensing with those requirements. Thus, in most criminal cases, this Court "strike[s] the balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1402; *United States v. Place*, 462 U.S.

696, 701 & n.2 (1983); *United States v. United States District Court*, 407 U.S. 297, 315 (1972).

Sobriety checkpoints are intended to do far more than apprehend the intoxicated drivers of motor vehicles who happen to be committing a public offense. One of the stated goals of the Michigan sobriety checkpoint program is to "deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents." App. to Pet. for Cert. 146a. A second objective is to "assure the safety of the general public as well as law enforcement officers involved." *Id.* at 147a. Thus, as is true of the California sobriety checkpoint program (*Ingersoll v. Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 [1987]),

"the sobriety checkpoint here was operated not for the primary purpose of discovering or preserving evidence of crime or arresting lawbreakers, but primarily for the regulatory purpose of keeping intoxicated drivers off the

highways to the end of enhancing public safety. Analytically it is much the same as an immigration checkpoint or a checkpoint to inspect for the safety of equipment or compliance with agricultural regulations. The threat to public safety is at least as great and the intrusion into Fourth Amendment interests is no greater here than in those other regulatory checkpoint inspections which have invariably been held constitutionally permissible." *Id.* at 1335, 743 P.2d at p. 1313.

The operation of a motor vehicle while intoxicated is a public offense, but that does not alter the administrative character of the checkpoint program. "[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem." *New York v. Burger, supra*, 482 U.S. at p. 712. Laws prohibiting drunk driving are intended to deter and punish those who

operate a motor vehicle while under the influence of alcohol or drugs. The sobriety checkpoint program is designed to protect the lives and property of motorists whom the drunk driver threatens. This Court has recognized the vital and noncriminal interest "in ensuring the safety of the traveling public" by prohibiting the use of drugs or alcohol by those using the Nation's transportation system. *Skinner v. Railroad Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1415. This Court's cases plainly teach that a sobriety checkpoint has an administrative purpose that is distinct from the penal goal of apprehending intoxicated motorists.

-C-

We submit that this Court's administrative search precedents support the conclusion that the Michigan

sobriety checkpoint program is constitutional under the Fourth Amendment.

Beginning with *See v. City of Seattle*, 387 U.S. 541 (1967), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court recognized that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment without a showing of probable cause directed to a particular place or person to be searched. *See also New York v. Burger, supra*, 482 U.S. 691; *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970).

Although *Camara* and *See* required a search warrant to conduct the administrative inspection (*see Marshall v. Barlow's, Inc., supra*, 436 U.S. at pp. 312-313), this requirement is not applicable to "pervasively regulated business[es]" (*Biswell, supra*, at p. 316) or to "closely regulated" industries "long subject to close supervision and inspection." *Colonnade, supra*, at pp. 74, 77. Additionally, a warrant is not required if obtaining one frustrates the governmental purpose behind the search (*Camara, supra*, at p. 533; *Donovan v. Dewey, supra*, 452 U.S. at p. 603), or if the purposes of the warrant requirement -- protection of privacy from unauthorized intrusion, notice to the citizen of the legal authorization, and detached scrutiny by a neutral magistrate -- are not served.

We turn to a consideration of the applicability of the search warrant and probable cause requirements.

(1)

Respondents do not, nor could they successfully, contend that a search warrant is required for the implementation of a sobriety checkpoint. To begin with, we can think of no everyday activity more heavily regulated than driving. *See New York v. Class*, 475 U.S. 106, 111-112 (1986); *Rakas v. Illinois*, 439 U.S. 128, 154 (1978) (Powell, J., concurring.) Second, the owner of a car has a lesser expectation of privacy in the vehicle than in his home or office. *See California v. Carney*, 471 U.S. 386, 392 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 365 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 441-442 (1973).

Third, the securing of a search warrant is completely impractical because the field officers do not anticipate

which vehicles will approach the checkpoints. Because the officers do not have probable cause to support the issuance of the warrant (*see Griffin v. Wisconsin, supra*, 483 U.S. at p. 877 & n.4) and because a warrant requirement for each car leads to inordinate or unacceptable delays, the only alternative is the issuance of a pro forma warrant broad enough to cover all prospective vehicles. In the latter case, however, little is served by the warrant requirement. A warrant notifies the citizen subject to the search or seizure that this intrusion is authorized by law and is not the random act of government agents. *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1415; *New York v. Burger, supra*, 482 U.S. at p. 703. The Michigan law requires advance publicity of the use of checkpoints and the conspicuous use of warning signs. App. to Pet. for Cert.

152a-153a. These requirements provide assurances to the motorists of the lawful authority to conduct the checkpoint. *Cf. United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 565.

In addition, the warrant requirement allows a neutral magistrate to determine whether the intrusion is justified. *See National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at p. 1391; *United States v. Chackwick*, 433 U.S. 1, 9 (1977). But because every motorist is detained, the field officers exercise no discretion and there are no special facts for a magistrate to evaluate. *Von Raab, supra*, at p. 1391. We conclude that the Fourth Amendment does not require the issuance of a warrant.

(2)

Turning to the more general requirement of probable cause (*Skinner, supra*, at pp. 1416-1417; *Von Raab, supra*,

at p. 1391; *New Jersey v. T.L.O., supra*, 469 U.S. at p. 340), we observe that this Court has declared that the probable cause standard "'is peculiarly related to criminal investigations'" (*Colorado v. Bertine, supra*, 479 U.S. at p. 371, quoting *South Dakota v. Opperman, supra*, 428 U.S. at p. 370 n.5) and "may be unhelpful in analyzing the reasonableness of routine administrative functions . . . especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at pp. 1391-1392. It has been estimated that only one of 2000 drunk drivers is arrested, presumably upon the basis of probable cause. 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment (2d Ed. 1987)

§10.8(d) at p. 73. It is readily apparent that the probable cause standard is wholly ineffectual to further the compelling state interest of highway safety. *Cf. United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 557. The remaining question is whether any particularized suspicion should be required to justify a detention at a sobriety checkpoint.

(3)

The "Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion." *Id.* at p. 561. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner v. Railway*

Labor Executives Ass'n, supra, 109 S.Ct at. 1417; *accord, National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct. at p. 1392. The Michigan sobriety checkpoint program is constitutional under this balancing test.

-D-

This Court's administrative search precedents require that (1) the invasion caused by the search or seizure be minimal; (2) the governmental interest be important; (3) the interest be furthered by the search; and (4) the interest be jeopardized by a requirement of individualized suspicion. *Skinner, supra*, at p. 1417; *New York v. Burger, supra*, 482 U.S. at pp. 702-703, 708-712. We turn to those considerations.

(1)

Respondents do not deny that the need to identify and remove drunk drivers from the highways is compelling,

if not absolute. This Court has lamented the "carnage caused by drunk drivers. . . ." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). The California Supreme Court documented the tragic extent of the problem:

"Nearly half of the traffic deaths in California between 1976-1980 involved drinking drivers. [Citations omitted.] Nearly one-quarter of all traffic accidents resulting in injury involved the use of alcohol. [Citations omitted.] Traffic deaths in the United States exceed 50,000 annually and approximately one-half of those fatalities are alcohol-related. [Citations omitted.]

"Indeed, in the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War." *Burg v. Municipal Court*, 35 Cal.3d 257, 261-262, 673 P.2d 732, 735 (1983).

The danger posed by the drunk driver on our streets and highways, is almost beyond exaggeration.

(2)

We have acknowledged that a checkpoint stop is a seizure within the meaning of the Fourth Amendment.

However, the intrusion is minimal for the following reasons.

First, there is a diminished expectation of privacy in an automobile. *United States v. Chadwick, supra*, 433 U.S. at p. 12; *California v. Carney, supra*, 471 U.S. at pp. 391-392. "There are sound reasons for this distinction [between automobiles and other locations]: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Rakas v. Illinois, supra*, 439 U.S. at p. 154 n.2 (1978) (Powell, J., concurring) (emphasis added.)

Second, a checkpoint stop is less intrusive than the roving-patrol detention, which the lower court impliedly sanctioned. App. to Pet. for Cert. 20a. "Roving patrols

often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975). "[T]he potential interference [by checkpoints] with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints. . . ." *United States v. Martinez-Fuerte, supra*, 428 U.S. at p. 559.

The Michigan courts found that the sobriety checkpoints were more intrusive than those described in *Martinez-Fuerte*, reasoning that the latter checkpoints were in fixed locations while those used in Michigan were subject to relocation. App. to Pet. for Cert. 21a-22a. This

conclusion is inconsistent with this Court's approval in dictum of license check roadblocks in *Delaware v. Prouse* (440 U.S. at p. 663), "which quite obviously cannot be maintained at a permanent location." 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at p. 76. The analysis of the New York Court of Appeals places the temporary nature of a checkpoint in its proper perspective:

"Nor is constitutionality affected by the shifting and temporary nature of the checkpoints. The fact that the Supreme Court has approved permanent roadblocks but disapproved roving patrol stops is not determinative. What is critical is the intrusiveness of the checkpoint in relation to the governmental purpose involved. The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails -- signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars [citations omitted]. The

only subjective difference between temporary and permanent checkpoints is that because its location is known in advance the latter can be avoided entirely by using a different route, but that difference is minimal as concerns anxiety, especially since a temporary checkpoint can also be avoided." *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 5 (1984).

In Michigan, the notice provided by the advance publicity and signs announcing the purpose of, and authorization for, the checkpoints minimized their intrusiveness for Fourth Amendment purposes.

Third, this Court has recognized that a seizure is less intrusive than a search, because only the latter impinges upon the right to privacy. *See Segura v. United States*, 468 U.S. 796, 806 (1984) (Opinion of Burger, C.J.); *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984). The Michigan sobriety checkpoint program authorizes the detention but not the search of the vehicle and its occupants. *Compare United States v. Martinez-Fuerte,*

supra, 428 U.S. 543, *with United States v. Ortiz, supra*, 422 U.S. 891. Inspection of the vehicle is limited to what can be seen without a search. *Texas v. Brown*, 460 U.S. 730 (1983). The Michigan checkpoint program apparently does not require the motorist to produce his driver's license and car registration. *See New York v. Class, supra*, 475 U.S. at pp. 113-114; *Delaware v. Prouse, supra*, 440 U.S. at p. 659. Because the motorist apparently has broken no law and thus poses no danger to the officers, he is not directed to step from his car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see* 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at 84.

Finally, the intrusion into a person's right of privacy may be minimized by the use of a plan which sets forth neutral criteria limiting the exercise for discretion by the

in-field officers. *Brown v. Texas, supra*, 443 U.S. at p. 41.

As this Court observed in *Martinez-Fuerte*,

"checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to lawabiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." 428 U.S. at 559. (Fn. omitted.)

The Michigan checkpoint program minimizes the exercise of discretion of in-field officers to a level compatible with Fourth Amendment values. The procedures for the operation of a checkpoint are developed by supervising law enforcement personnel. Not

only does the formation of policy by high ranking personnel reduce the potential for abusive stops, it also facilitates judicial review of the operations (*ibid.*), an important consideration in Fourth Amendment cases. *See United States v. Leon*, 468 U.S. 897, 924 (1984). Under the program before this Court, sites are selected to promote safety and minimize inconvenience, every motorist is required to be diverted, and discretion is exercised only in the identification of motorists who are asked to perform a field sobriety test. Officers make that determination on the basis of specific and articulable circumstances, just as they do on traffic patrol. *Terry v. Ohio, supra*.

(3)

But it is not sufficient to establish, as we have, that the gravity of the public interest justifies the limited intrusion into the personal liberty, privacy, and dignity of

the motorists. The intrusion must also advance that public interest. *Brown v. Texas, supra*. This Court has indicated unmistakably that a checkpoint serves its purpose under the Fourth Amendment if it deters the conduct sought to be interdicted. *See Delaware v. Prouse, supra*, at p. 660; *United States v. Martinez-Fuerte, supra*, at p. 557.

Preliminarily, we make the following observations about the requirement that a checkpoint or any other program be "effective." First, just as the Fourth Amendment does not demand that any particular governmental activity be the "least intrusive" means possible to achieve the stated objective (*Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1419 n.9; *Colorado v. Bertine, supra*, 479 U.S. at pp. 373-374; *Illinois v. Lafayette*, 462 U.S. 640, 647 [1983]), neither does it require that the governmental response to a problem be

the "most effective" means available. A contrary principle would unjustifiably hamper a state in developing tools to combat social ills, for only the most effective could be used. In terms of privacy interests, it is possible that in any given situation the most effective means may also be the most intrusive. *See Von Raab, supra*, at p. 1396 n.4. The Fourth Amendment's flexible standard of reasonableness requires neither that the means be the most effective nor that they be the least intrusive.

Second, the effectiveness of a procedure is not necessarily determined by the percentage of violators who are detected. *See National Treasury Employees Union v. Von Raab, supra*, 109 S.Ct at p. 1395. In *Martinez-Fuerte*, for example, 725 deportable aliens were found in 146,000 vehicles, meaning that one alien was found for every 200 cars stopped. 428 U.S. at p. 554. This Court found that

the checkpoint was effective. By contrast, this Court condemned the procedure in *Prouse* as not "sufficiently productive to qualify as a reasonable law enforcement practice" because there was no evidence to indicate that a random stop of motorists was an effective way to identify unlicensed drivers. 440 U.S. at pp. 659-660. As Professor La Fave points out, however, the real evil in the Delaware procedure was its randomness, not its lack of efficiency. "This can only mean that because a checkpoint operation is much less intrusive and threatening than a system of random stops, it does not require nearly as strong a showing of likely 'success' in the sense of stop/apprehension percentages." 4 La Fave, Search and Seizure, *supra*, § 10.8(d) at 74.

Judged by these considerations, sobriety checkpoints have been shown to be effective. It is true that evidence

of their effectiveness is tentative, but that is primarily attributable to their recent vintage as a technique in the war against drunk driving. If the scarcity of data invalidates the use of sobriety checkpoints, they could never be employed, because no evidence of effectiveness could be developed.

Nevertheless, California's experience with sobriety checkpoints has demonstrated its value as a deterrent to drunk driving. In December of 1984, the California Highway Patrol conducted checkpoints in North Sacramento, Redding, Glendale, and Bakersfield. At those locations there were 25.6% more arrests for drunk driving, 18.8% fewer accidents, and 21.3% fewer injuries than in December 1983, before the use of checkpoints in those areas. Some 10,150 vehicles were screened in 76 hours, an average of 2.2 per minute. Department of California

Highway Patrol, Sobriety Checkpoints -- Phase I Evaluation (1985) at 5-6. Sobriety checkpoints were conducted in North Sacramento during the period May 1 - October 31, 1985. Over 12,000 vehicles were screened. Arrests increased by 1.3% in that area over the comparable period for 1984 (the statewide increase was 0.7%), accidents decreased by 12.9% (versus 6.0% statewide), and injuries decreased by 13.1% (versus 5.2% statewide). Department of California Highway Patrol -- Phase II Evaluation (1986) at 9-10.

During the period May-September 1988, the California Highway Patrol conducted 38 checkpoints which screened 33,475 vehicles. As a result, 918 field sobriety tests were conducted (2.7% of the cars) and 283 persons were arrested (0.84%). Department of California Highway Patrol, Final Report: Driving Under the Influence (DUI)

Program, May-September 1988, at 2-13. Accidents decreased by 7.1% compared to the corresponding period in 1987; the statewide decrease was only 3.7%. *Id.* at 2-15, 2-16. Arrests had also decreased: 6.2% in checkpoint areas; 8.2% statewide. *Id.* at 2-16. "This result indicated that the use of checkpoints may have successfully deterred some motorists from driving while under the influence. Newspaper articles related to the Department's operation of sobriety checkpoints may have also contributed to the deterrent effect." *Ibid.*

We believe that the California experience provides ample data to establish the effectiveness of the sobriety checkpoint program. The number of alcohol-related accidents has decreased more in the checkpoint areas than in the rest of the state. Almost one drunk driver is found in each 100 vehicles screened, a figure which compares

favorably to the national average of one arrest for each 2000 intoxicated drivers. We emphasize that the program is efficient, taking less than 30 seconds to screen each car.

(4)

Finally, we argue that the dispensation of individualized suspicion to justify the detention is necessary to effectuate the purpose of the program. See *Skinner v. Railway Labor Executives Ass'n, supra*, 109 S.Ct. at p. 1417. That purpose is to protect the lives of highway motorists. If an officer cannot stop a motorist unless he is driving erratically, official action may come too late. "First, the erratic driver may cause injury to himself or others before he is observed by patrols. Second, the ability of a drunk driver to avoid erratic movements along a roadway does not mean he will be able to respond to an emergency where prompt reflexes may be of great importance."

People v. Bartley, 109 Ill.2d 273, 486 N.E.2d 880, 886 (1985).

"[I]t is only fortuitous that an officer happens to be in a position to see a drunk entering the freeway on the off-ramp before that drunk happens to kill some innocent person. We are not likely to achieve the situation where there will be police officers available at closing time on a Labor Day weekend night at each of the locations where patrons shuffle from their favorite saloon to the parking lot. . . ." *State ex rel. Ekstrom* v. *Justice Court*, 136 Ariz.1, 668 P.2d 992, 999 (1983) (conc. opn.).

The requirement of individualized suspicion has resulted in an arrest ratio of one to 2,000 offenders and a yearly death toll of over 25,000 persons. These statistics only hint at the human suffering involved and are eloquent

evidence of the need to act in the absence of an individualized suspicion.

- E -

The vast majority of the cases to pass upon the constitutionality of sobriety checkpoints have upheld their use, either on the facts of the case or in principle. These decisions provide persuasive evidence that checkpoint programs have promoted highway safety while minimizing official intrusion into the privacy of motorists. This Court does not lightly "'brush aside the experience of States'" which cast light upon the efficacy of a procedure. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961), quoting *Wolf* v. *Colorado*, 338 U.S. 25, 31-32 (1949).

Sobriety checkpoint programs have been upheld against constitutional challenge in Arizona (*State* v. *Superior Court*, 143 Ariz. 45, 691 P.2d 1073 [1984]);

Arkansas (*Coffman* v. *State*, 26 Ark.App. 45, 759 S.W.2d 573 [1988]); California (*Ingersoll* v. *Palmer*, 43 Cal.3d 1321, 743 P.2d 1299 [1987]); Florida (*State* v. *Jones*, 483 So.2d 433 (Fla. 1986) [dictum]; *State* v. *Abelson*, 485 So. 861 [Fla.App. 1986]); Georgia (*State* v. *Golden*, 171 Ga.App. 27, 318 S.E.2d 693 [1984]); Illinois (*People* v. *Bartley*, 109 Ill. 273, 486 N.E.2d 880 [1985], *cert. denied*, 475 U.S. 1068 [1986]); Indiana (*State* v. *Garcia*, 500 N.E.2d 158 [Ind. 1986], *cert. denied*, 481 U.S. 1014 [1987]); Iowa (*State* v. *Riley*, 377 N.W.2d 242 [Ia.App. 1985]); Kansas (*State* v. *Deskins*, 234 Kan. 102, 673 P.2d 1174 [1983]); Kentucky (*Kinslow* v. *Commonwealth*, 660 S.W.2d 677 [Ky.App. 1983], *cert. denied*, 460 U.S. 1105 [1984]); Maine (*State* v. *Leighton*, 551 A.2d 116 [Me. 1988]); Maryland (*Little* v. *State*, 300 Md. 485, 479 A.2d 903 [1984]); Massachusetts (*Commonwealth* v. *Trumble*, 396 Mass. 81, 483 N.E.2d

1102 [1985]); Mississippi (*Miller* v. *State*, 373 So.2d 1004 [Miss. 1979]); Nebraska (*State* v. *Crom*, 222 Neb. 273, 383 N.W.2d 461 [1986] [dictum]); New Jersey (*State* v. *Kirk*, 202 N.J.Super. 28, 493 A.2d 1171 [App.Div. 1985]); New Mexico (*City of Las Cruces* v. *Betancourt*, 735 P.2d 1161 [N.M. 1987]); New York (*People* v. *Scott*, 63 N.Y.2d 518, 473 N.E.2d 1 [1984]); Ohio (*State* v. *Alexander*, 22 Ohio Misc.2d 34, 489 N.E.2d 1093 [1985]); Oregon (*Nelson* v. *Lane County*, 304 Or. 97, 743 P.2d 692 [1987] [statute required under state law]); Pennsylvania (*Commonwealth* v. *Tarbert*, 517 Pa. 277, 535, 1035 [1987] [checkpoints constitutional, but prohibited by statute]); Texas (*Webb* v. *State*, 739 S.W.2d 802 [Tex.Cr.App. 1987] [dictum]); Vermont (*State* v. *Martin*, 145 Vt. 562, 496 A.2d 442 [1985]); and Virginia (*Lowe* v. *Commonwealth*, 230 Va.

346, 337 S.E.2d 273 [1985], *cert. denied*, 475 U.S. 1084 [1986]).

The cases upholding the state's right to use sobriety checkpoints employ a similar methodology: they balance the need to control drunk drivers to the end of promoting highway safety against the nature of the invasion into the privacy of the motorist. That intrusion is minimized to an acceptable level by the implementation of a program, devised by policy-making administrative officials, which circumscribes the discretion of the officers, assures a safe and well-lighted checkpoint, gives adequate warning to oncoming motorists, requires the display of legitimate policy authority, minimizes the time of detention, and provides for the detention of vehicles on a systematic, nonrandom basis. ***See, e.g., People* v. *Bartley, supra***, at pp.

887-888; *Little* v. *State, supra*, at p. 911; *State* v. *Deskins, supra*, at p. 1185; *People* v. *Scott, supra*, at p. 4.

To be sure, a number of states have prohibited the use of sobriety checkpoints on constitutional grounds. Some decisions are based in whole or in part on the jurisdiction's state constitution. *E.g., State* v. *Church*, 538 So.2d 993 (La. 1989); *State* v. *Koppel*, 127 N.H. 286, 499 A.2d 977 (1985). Other cases either rely upon considerations which are unapplicable to this case or rest upon arguments which do not withstand scrutiny. In *State* v. *Olgaard*, 248 N.W.2d 382 (S.D. 1976); *Webb* v. *State, supra*, 739 S.W.2d 802; and *City of Seattle* v. *Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988), the courts were concerned with the considerable amount of discretion exercised by the officers, the lack of high-level supervision, or the irregular nature of the checkpoints. By contrast,

the Michigan program requires policy makers to select the sites based upon valid and neutral criteria and greatly circumscribes the discretion of the field officers.

Some courts have found the use of temporary checkpoints objectionable, purporting to distinguish *Martinez-Fuerte* on that basis. *See State* v. *Olgaard, supra*, 248 N.W.2d at p. 394; *State* v. *Smith*, 674 P.2d 562, 564-565 (Okla.Ct.Crim.App. 1984). The New York Court of Appeals met and defeated this argument in *People* v. *Scott, supra*, 473 N.E.2d at p. 6, quoted at pages 27-28 of this brief.

A few courts have invalidated checkpoint programs on the ground that there are equally effective and less intrusive means of identifying and deterring drunk drivers -- harsher penalties and observation of erratic driving by

roving patrols, for example. *State* v. *Koppel, supra*, A.2d at p. 982.

We reiterate our argument (see Part D(3)) that the reasonableness of a search or seizure does not depend upon a showing that it is the least intrusive or most effective means possible of achieving a desirable social purpose. In addition, as explained earlier, an erratic driver may cause injury before he is observed by a roving patrol.

Deterrence by means of enacting harsher penalties has superficial appeal, but the "problem is that deterrence by punishment is often ineffective unless combined with a fear of apprehension." *State ex rel. Ekstrom* v. *Justice Court*, 136 Ariz 1, 668 P.2d 992, 1000n.3. None of the 2,000 drunk drivers who are on the road at any given time fears that he will be the unlucky one to be arrested.

Other available law enforcement techniques simply do not deter. Furthermore, the courts which focus upon criminal penalties misperceive the essential purpose of sobriety checkpoints, which is to promote highway safety, not apprehend and punish criminals.

For these reasons we submit that the majority view validating sobriety checkpoint programs is also the better reasoned position. When numerical and logical superiority coincide, approval should follow. We ask this Court to approve the majority rule. The safety of thousands of motorists requires no less.

-F-

We conclude by addressing the unstated fear that the use of checkpoints is another step toward the transformation of our society into a police state in which uniformed officers are placed on every street corner, in

every public place, with citizens required to identify themselves before walking the streets, boarding common carriers, or driving the highways. Is validation of sobriety checkpoints the first step on the road to a society which is antithetical to the cherished values and beliefs supporting this nation? The answer is "no."

We do not believe that the validity of a legal proposition can be determined by carrying it to its ultimate conclusion. Crime could be deterred by placing a police officer in every home, but such a repugnant prospect cannot invalidate the use of a sobriety checkpoint as a deterrent technique. Whatever imaginary specters may haunt some, the undeniable reality is that drunk drivers are slaughtering innocents on the roads of our nation. This case addresses a specific condition which results in the deaths of thousands of Americans each year.

To combat the growing menace of the drunk driver, petitioners wish to detain vehicles at certain locations for approximately 30 seconds. There is no arrest or warrantless search. There is only a brief encounter at which trained officers quickly determine whether the operator of a 3000-pound moving machine is too drunk to maneuver it safely.

It is true that the increased fear of detention may deter other crimes, but those situations can be easily distinguished for purposes of this case:

"In drunk driving it is the very presence of the vehicle on the road which is the object to be prevented and the single thing most effectively accomplished by roadblocks. In narcotics enforcement, on the other hand, there is no assurance that roadblocks would prevent possession or sale, and there is no method of enforcement except by search of the person and vehicle itself. In my opinion, this involves too great an infringement on personal liberty. The deterrent roadblock for drunk driving would, however, force the car off the road or prevent it coming on the road, thus meeting the law enforcement objective with a very minimal infringement on personal liberty." *State ex*

rel. Ekstrom v. *Justice Court, supra*, 668 P.2d at p. 1000n.3 (conc. opn.).

In *United States v. Knotts*, 460 U.S. 276 (1983), the defendant argued that the result of upholding the use of a beeper device "would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'" *Id.* at p. 283. This Court responded to that concern:

"But the fact is that the 'reality hardly suggests abuse,' [citation omitted]; if such dragnet-type law enforcement practices as [defendant] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." 460 U.S. at pp. 283-284.

Petitioners and *amici curiae* want to control drunk drivers with the use of checkpoints and have attempted to describe the circumstances under which the employment of checkpoints is constitutionally reasonable. Any abuse of this technique by attempted expansion to unsuitable

situations can be met with the appropriate judicial response. Until then we ask this Court to uphold the use of sobriety checkpoints.

CONCLUSION

For the foregoing reasons, the judgment of the Michigan Court of Appeals must be reversed.

DATED: November 15, 1989

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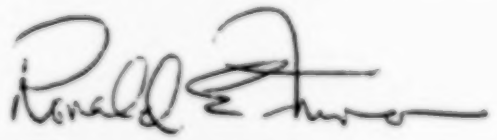

RONALD E. NIVER
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CERTIFICATE OF SERVICE BY MAIL

Michigan Department of State Police and Col. R.T. Davis, Director the Michigan Dept. of State Police,	)	
Petitioners,	)	
v.	)	No. 88-1897
Rick Sitz, Joseph F. Young, Sr. Dominic J. Jacobetti, Dick Allen, Keith Muxlow and Jack Welborn,	)	
Respondents.	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000 in the City and County of San Francisco, State of California; that on November 16, 1989, he served true copies of the attached Brief Amici Curiae for the States of California, Florida, North Carolina and the Commonwealth of Massachusetts in the above-entitled

matter on counsel for respondent and petitioners by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

RONALD E. NIVER
Deputy Attorney General

Subscribed and sworn to before me this
16th day of November, 1989.

Marilyn J. Mauga
Notary Public in and for said County State

MARILYN J. MAUGA
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN FRANCISCO
My Commission Expires August 6, 1992